12-29-2009

Terra-West, Inc. v. Idaho Mut. Trust, LLC Appellant's Reply Brief Dckt. 36523

IN THE SUPREME COURT OF THE STATE OF IDAHO

TERRA-WEST, INC., an Idaho corporation, Plaintiff-Respondent, vs. IDAHO MUTUAL TRUST, LLC, an Idaho limited liability company, Defendant-Appellant. and MIKE URWIN ENTERPRISES, INC., an Idaho corporation, RED CLIFF DEVELOPMENT, INC., an Idaho corporation; ALLOWAY ELECTRICAL WHOLESALE SUPPLY CO., INC., an Idaho corporation; KRISTEN R. THOMPSON, an individual; ALL PRSONS IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION, Defendants.	Supreme Court No. 36523

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Ada

The Honorable Ronald J. Wilper, District Judge, Presiding

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Defendant-Appellant Idaho Mutual Trust, LLC ("Idaho Mutual"), by and through its attorneys of record, Hawley Troxell Ennis & Hawley LLP, respectfully submits this Appellant's Reply Brief in support of its appeal of the District Court's April 22, 2009 interlocutory order granting Plaintiff-Respondent Terra-West, Inc. ("Terra-West") leave to file an amended complaint.

I.
INTRODUCTION

Under Idaho law, the time frame for enforcing a claim of mechanic's lien is more than a statute of limitations, it is a limit on the jurisdiction of the district court – a limit on the right to sue at all. Under Idaho law, Terra-West's lien, recorded August 12, 2008, expired on February 12, 2008.

Though Terra-West filed a motion for leave to amend prior to February 12, 2008, that motion did not "commence proceedings," nor did it toll the 6-month jurisdictional period for enforcement of Terra-West's mechanic's lien. Because Terra-West did not timely commence an action to enforce its lien, Terra-West lost its right to sue on its mechanic's lien and the District Court was without jurisdiction to enforce it.

In its Respondent's Brief, Terra-West does not address the controlling cases that bar enforcement of a mechanic's lien after the 6-month jurisdictional period. Instead, Terra-West raises an entirely new issue not raised in the District Court below, and cites to several non-binding cases from other jurisdictions concerning rules applicable to statutes of limitations. Unfortunately for Terra-West, the Idaho Supreme Court has expressly rejected Terra-West's

argument. Also, since the expiration of a mechanic's lien is not a statute of limitations issue, Terra-West's argument is irrelevant.

Idaho Mutual has also shown that Terra-West's mechanic's lien cannot relate back to the filing of the initial complaint in this lawsuit because its second, corrected lien is a new alleged right in the property at issue, based on new work not suggested in the initial complaint. In fact, Terra-West's original complaint (the "Original Complaint") to foreclose Terra-West's first, statutorily invalid lien (the "First Lien") expressly states that Terra-West had completed *all* work under the contract at issue, putting all defendants on notice that no additional work would be performed on the property. Terra-West's second lien, the lien at issue in this appeal (the "Second Lien"), is completely contrary to the notice Terra-West provided to defendants. Terra-West makes no response to this argument in its Respondent's Brief.

Accordingly, Terra West's Second Lien is nothing more than Terra-West's attempt to create a non-statutory right to resurrect and enforce Terra-West's facially invalid First Lien. Because Terra-West did not timely "commence proceedings," or because its Amended Complaint (the "Amended Complaint") cannot relate back, Terra-West should not be able to make an end-run around Idaho law and resurrect its facially invalid lien.

II.
ARGUMENT

A. Idaho Mutual Has Established That Terra-West's Second Lien Expired Under Idaho Code Section 45-510.

In its Appellant's Brief, Idaho Mutual set forth the fundamental problem with the Second Lien and Terra-West's efforts to foreclose it: Terra-West is attempting to create a non-statutory

right to revive its facially invalid First Lien. Terra-West did not address this argument in its Respondent's Brief, but it is at the heart of this case.

Terra-West's First Lien was declared facially invalid because Terra-West failed to properly verify it. Terra-West then allegedly did additional work (allegedly $59,136 worth, or 17.6% of the value of the First Lien) and then filed the Second Lien. The Second Lien incorporates far more than the additional work done: it includes all the amounts claimed under the First Lien, as well as the work-started date alleged under the First Lien. Given Terra-West's Original Complaint assertion that it had performed all of its obligations under the contract concerning the Property, it is possible that the sole reason Terra-West performed the additional work was so that it could resurrect its facially invalid lien.

The Second Lien is not only an effort to circumvent Idaho law, but it is unenforceable in its own right. As argued in Idaho Mutual's Appellant's Brief, the Second Lien expired under Idaho Code Section 45-510:

- Under Idaho Code Section 45-510, a mechanic's lien expires six months after it is recorded, "unless proceedings be commenced in a proper court within that time to enforce" the lien.
- The six-month deadline prescribed by Idaho Code Section 45-510 is much more than a statute of limitation: it is a jurisdictional deadline. When a lien expires, the Court has no jurisdiction to enforce the lien "any more than if it had never been created." *Palmer v. Bradford*, 86 Idaho 395, 401, 388 P.2d 96, 99 (1963). *See also Willes v. Palmer*, 78 Idaho 104, 108, 298 P.2d 972, 974 (1956).

- Idaho Rule of Civil Procedure 3(a) defines "commencement of proceedings" as follows: "A civil action is commenced by the filing of a complaint with the court."
- Thus, the only way, under Idaho law, to preserve a mechanic's lien from expiring is to file a complaint to foreclose it. A motion for leave to amend is insufficient: "Service of a motion for leave to file [a complaint], even with the proposed [complaint] attached, is not the equivalent of service of the [complaint] itself. . . . Filing and service of the [complaint] itself could be properly accomplished only *after* permission had been obtained from the court." *Viafax Corp. v. Stuckenbrock*, 134 Idaho 65, 70, 995 P.2d 835, 840 (Ct. App. 2000). *See also* Idaho Rule of Civil Procedure 15(a).
- As the Second Lien was recorded August 2, 2008, Terra-West had until February 12, 2009 to file a complaint, i.e., commence proceedings, to foreclose it. Terra-West filed a motion for leave to amend by that time, but leave to amend had not been granted. Terra-West did not file a complaint – had not "commenced proceedings" – to foreclose the Second Lien by February 12, 2009, so the Second Lien expired, and as of February 13, 2009, the District Court no longer had jurisdiction to grant the motion for leave to amend.

Under these facts, Terra-West should be barred from pursuing any action to foreclose the Second Lien. This was the precise result in *Diehl Lumber Transportation, Inc. v. Mickelson*, 802 P.2d 739 (Utah App. 1990).

Moreover, Terra-West could have prevented the expiration of the Second Lien: it could have filed its motion to amend immediately after the Second Lien was recorded, rather than wait

five months, or it could have filed a separate action to foreclose the Second Lien. It did not take either action, and is now barred from foreclosing its Second Lien.

B. Terra-West's Argument Is Not Supported By Idaho Law.

In its Respondent's Brief, Terra-West did not address the well-established Idaho case law concerning the jurisdictional effect of Idaho Code Section 45-510. Instead, Terra-West raised only one argument on the issue of enforcement of the Second Lien under Section 45-510: that *the Amended Complaint is deemed filed as of the date the Motion for Leave to Amend was filed, and therefore, proceedings were commenced prior to the expiration of the lien.* Terra-West's argument has already been rejected by the Idaho Supreme Court.

In *Griggs v. Nash*, 116 Idaho 228, 775 P.2d 120 (1989), EMSI claimed that it had been damaged by attorney Kim Trout's legal malpractice in connection with EMSI's brokering of a home loan. The Idaho Supreme Court first noted that the statute of limitations applicable to EMSI's claim expired on September 9, 1987, and then outlined the following sequence of events: on January 29, 1987, EMSI filed a motion for leave to file a third-party complaint against Mr. Trout; on September 10, 1987, *after the statute of limitations expired*, the court entered an order granting EMSI leave to file its third-party complaint; and on September 23, 1987, EMSI filed its third-party complaint. *Griggs*, 775 P.2d at 126. Mr. Trout argued there, as Idaho Mutual does here, that the motion for leave to file the third-party complaint did not toll the statute of limitations and that EMSI's claim had expired. The Idaho Supreme Court agreed, citing the very principle of law urged by Idaho Mutual here:

> Pursuant to I.R.C.P. 3(a), an action is commenced by the filing of a complaint. Therefore, the action contained in the third-party complaint was not commenced until September 23, 1987. This

> was at least 14 days after the two year statute of limitations had run Therefore we affirm the trial court's ruling that the third-party complaint was barred . . .

Id. In both this case and in *Griggs*, the motion for leave to file was filed before the period in which to commence suit expired, the order granting leave was entered after the period had expired, and the actual complaint was filed shortly thereafter. In *Griggs*, the Idaho Supreme Court issued the precise ruling argued for by Idaho Mutual throughout this litigation: under Idaho Rule of Civil Procedure 3(a), the action was not commenced until the complaint was filed, which could not have occurred until after the court granted leave to file, and because the order granting leave to file was not given until after the time to commence the action had expired, the complaint was barred. The filing of the motion for leave did not toll the statute of limitations, and the filed complaint did not relate back to the filing of the motion for leave.

Terra-West's argument here is directly contrary to Idaho law, as set forth in *Griggs*. The Amended Complaint was not filed until after the District Court granted leave to amend on April 22, 2009, which was more than two months after the six month period for enforcing the Second Lien expired. Under Idaho Code Section 45-510 and *Griggs*, the Amended Complaint is barred.

Besides being directly contrary to Idaho law, Terra-West's argument also highlights the distinction repeatedly made by the Idaho Supreme Court between statutes of limitations and the jurisdictional weight of Idaho Code Section 45-510: the six month period for enforcing a mechanic's lien "is more than a mere statute of limitations which is waived if not pleaded; [] it is a limitation, not alone upon the remedy, but upon the right or liability itself." *Willes*, 298 P.2d at

974. Shortly after that declaration, the Idaho Supreme Court repeated the jurisdictional import of Idaho Code Section 45-510:

> The statute creates and limits the duration of the lien. The statute also gives jurisdiction to the court to foreclose or enforce a lien on certain conditions – the filing of a claim of lien, and the commencement of the action within the time specified after such claim is filed. *If these things are not done no jurisdiction exists in the court to enforce the lien.* When the limit fixed by statute for duration of the lien is past, no lien exists, any more than if it had never been created.

Palmer, 388 P.2d at 99 (emphasis added) (internal citations omitted). As recognized by *Willes v. Palmer*, the laws of most states give the mechanic's lien enforcement period similar jurisdictional weight:

> In most jurisdictions having mechanic's lien statutes fixing the time within which the lien may be enforced, the time fixed is regarded as a limitation upon the right as well as upon the remedy, and that the lien is lost if the action is not brought within the specified time.

Willes, 298 P.2d at 974. The Idaho Supreme Court's treatment of the six-month period as jurisdictional, as well as its recognition that it is the majority rule in other states, is still true today, as indicated by the almost-identical case *Diehl, supra*. *See also* 53 AM. JUR. 2D *Mechanics' Liens* § 348 (2006) ("Normally, moreover, the statute governing the time for foreclosure of a mechanic's lien differs from a pure statute of limitations in that it qualifies the right as well as the remedy. A statute that invalidates the mechanic's lien . . . is not a traditional statute of limitations but a substantive restriction on the lien. . . . Under such statutes, it is generally held that the timely bringing of an enforcement suit is an element of the lienor's cause of action, that the lien becomes void for all purposes as to any person not made a party to an

enforcement suit within the time prescribed by statute, that the lien expires irrespective of agreement or waivers to the contrary, and that the failure to enforce the lien within the time prescribed by statute is not waived by the defendant's failure to raise an objection by demurrer or answer").

That Terra-West has not appreciated the jurisdictional weight of Idaho Code Section 45-510 is shown not only by its failure to commence proceedings to foreclose the Second Lien, but also by its Respondent's Brief, wherein Terra-West failed to so much as mention *Palmer* or *Willes*, and instead, cited to case law from other jurisdictions, all of which concerned *statutes of limitations*, and virtually none of which concerned the foreclosure of a mechanic's lien. Not only is Terra-West's argument contrary to express Idaho Supreme Court precedent (*see Griggs, supra*), the argument itself is irrelevant because a statute of limitations is not at issue here. As cited above, Idaho law expressly rejects the idea that Idaho Code Section 45-510 is a statute of limitations. *Diehl* demonstrates that Idaho's sister states also reject such analogies. The argument that the period for enforcing a mechanic's lien is equivalent to a statute of limitations not only has no support in Idaho, but is expressly rejected by both Idaho courts and other courts and should be rejected here.

At the District Court proceedings, Terra-West never raised the argument that the period for enforcing a lien is analogous to a statute of limitation; instead, Terra-West argued that the motion for leave to amend itself "commenced" proceedings, an argument that also has no support in Idaho law. Tr. p. 8:12-16. By failing to make that argument here, Terra-West has implicitly conceded that a motion for leave to amend, standing alone, cannot "commence proceedings" under Idaho Code Section 45-510. *See Davis v. Parrish*, 131 Idaho 595, 599,

961 P.2d 1198, 1202 (1998) (reiterating the rule that the Supreme Court "will not consider on appeal issues which are completely unsupported by argument or authority"). This Court need not consider Terra-West's new argument, raised for the first time on appeal. *Meyers v. Hansen*, No. 35534, 2009 WL 4093782, at *7 (Idaho Nov. 27, 2009) (holding that where an "argument appear[s] nowhere in any . . . briefing before the district court," it "is therefore waived. Appellate court review is limited to the evidence, theories and arguments that were presented below. Accordingly, [the Supreme Court] will not consider" such arguments (internal citations omitted)). Even if the Court decides to consider Terra-West's argument, the argument should be rejected as contrary to Idaho law as set forth herein. The Second Lien expired on February 12, 2009, along with the District Court's jurisdiction to enforce it.

C. Idaho Mutual Has Established That The Proposed Amended Complaint Does Not Relate Back To The Original Complaint.

Terra-West's Amended Complaint does not relate back to the filing of the Original Complaint for the same reason it does not relate back to the time the motion for leave to amend was filed: because proceedings had not commenced to enforce the Second Lien, it expired and the District Court does not have jurisdiction to enforce it. Moreover, as set forth in Idaho Mutual's Appellant's Brief, the Amended Complaint does not relate back to the Original Complaint under traditional relation-back principles:

- A new claim cannot arise out of the original transaction or occurrence where the original pleading does not give notice of the new claim, and in those cases, a new claim will not relate back. *Wing v. Martin*, 107 Idaho 267, 270, 688 P.2d 1172, 1175 (1984); *Black v. Ameritel Inns, Inc.*, 139 Idaho 511, 514, 81 P.3d 416, 419 (2003).

- The action to foreclose the Second Lien cannot arise out of the events giving rise to the Original Complaint because the Original Complaint only sought to foreclose the First Lien. The Second Lien is a new claimed right in the property at issue, premised on allegedly new work that had not been performed when the Original Complaint was filed.
- Proof that the Second Lien cannot arise out of the Original Complaint is found in the "notice test" espoused by the Idaho Supreme Court: Terra-West's Original Complaint did not give notice of the additional work that the Second Lien purports to secure payment for – in fact, Terra-West's Original Complaint states affirmatively that Terra-West "performed *all* of its obligations under the terms of the contract" for improvements to the Property. R. p. 11 (emphasis added). The Original Complaint affirmatively notifies all defendants that Terra-West would perform no further work on the Property.

D. Terra-West's Argument For Relation-Back Is Not Supported By Idaho Law.

In its Respondent's Brief, Terra-West does not try to explain or justify its Original-Complaint statement that it "performed *all* of its obligations under the terms of the contract" – in fact, Terra-West does not respond to Idaho Mutual's argument on this point at all. Instead, Terra-West makes a straw man out of Idaho Mutual's relation-back argument, and would seek to prevail in this appeal by attacking that straw man, rather than addressing the real issues.

Terra-West argues that *Idaho Mutual has "recast" its relation back argument to a "notice" argument*. Terra-West's argument misses the mark: under Idaho law, the notice

argument *is* the relation back argument. Idaho Rule of Civil Procedure 15(c) states that: "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence *set forth or attempted to be set forth in the original pleading*, the amendment relates back to the date of the original pleading" (emphasis added). As cited by Idaho Mutual, whether the claims in an amended pleading "arose out of the conduct, transaction, or occurrence set forth ... in the original pleading," depends on whether the original pleading gave notice of the amended pleading: where the amended claim occurred "at a different time and location" and "the original complaint [does] not give notice of the legal theory advanced in the amended complaint, the amendment [is] a new cause of action which [does] not relate back." *Wing*, 688 P.2d at 1175.

Even the cases cited by Terra-West identify "notice" as the test for relation-back: in *Herrera v. Conner*, 111 Idaho 1012, 729 P.2d 1075 (Ct. App. 1986), the Court of Appeals confirmed the accuracy of Idaho Mutual's reading of *Wing, supra*: "A careful reading [of *Wing*] reveals that the *Wing* decision was based on the failure of the original complaint to give *notice* of the plaintiffs' theory of the case." *Herrera*, 729 P.2d at 1018. In *F.D.I.C. v. Jackson*, 133 F.3d 694 (9th Cir. 1998), also cited by Terra-West, the Ninth Circuit held:

> In determining whether an amended cause of action is to relate back, the emphasis is not on the legal theory of the action, but *whether the specified conduct* of the defendant, upon which the plaintiff is relying to enforce his amended claim, *is identifiable with the original claim.* ... In this case, the original complaint contains all of the allegations against [the Defendant] later restated in the second amended complaint.

Id. at 702 (emphasis added). In this instant case, the Second Lien is premised on additional work not alleged in the Original Complaint; unlike *F.D.I.C.*, Terra-West's Original Complaint does

not "contain[] all of the allegations ... later restated in the ... [A]mended [C]omplaint." *See id.* Finally, Terra-West's citation to Wright & Miller's *Federal Practice and Procedure*, § 1497 also states the universality of the Notice rule:

> although not expressly mentioned in the rule, the courts also inquire into whether the opposing party has been put on notice regarding the claim or defense raised by the amended pleading. Only if the original pleading has performed that function ... will the amendment be allowed to relate back. ... A failure of notice will prevent relation back.

6A THE LATE CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1497 (2d ed. 2009). As to the issue of "notice" of the amended pleading, Wright & Miller suggest that

> An approach that better reflects the liberal policy of Rule 15(c) is to determine whether the adverse party, viewed as a reasonably prudent person, ought to have been able to anticipate or should have expected that the character of the originally pleaded claim might be altered or that other aspects of the conduct, transaction, or occurrence set forth in the original pleading might be called into question.

Id. Terra-West's Original Complaint does not contain any allegation concerning the Second Lien or of any additional work which allegedly gave rise to the Second Lien. The Second Lien did not even exist at the time the Original Complaint was filed. In fact, the Original Complaint gives affirmative evidence that there would be no further work done on the property because Terra-West stated it had "performed all of its obligations under the terms of the contract." R. p. 11.

The "notice" test does not require a court to consider the substantive merits of a proposed amended claim, as Terra-West suggests Idaho Mutual is arguing. This Court does not have to

make a determination as to the accuracy of Terra-West's *post hoc* contradiction of its Original Complaint because the Original Complaint simply does not put opposing parties "on notice regarding the claim or defense raised by the amended pleading." *See Wright & Miller, supra.* Given the Original Complaint declaration that Terra-West had performed all of its contractual obligations with respect to the property at issue, a reasonably prudent person in Idaho Mutual's position, without access to the contract, would not anticipate Terra-West would perform later work, claim the additional work was done pursuant to contract in direct contravention of the Original Complaint's declaration, and then try to claim that the subsequent work and lien based thereon is part of the Original Complaint.

Terra-West's related straw man that *amended claims do not have to be contained in the original pleading* also misconstrues Idaho Mutual's position. Idaho Mutual does not argue that amended claims must be contained in the original pleading, only that where there is a new factual situation other that than alleged in the original pleading, the new pleading cannot relate back. The case which Terra-West cites in support of its straw man attack actually supports Idaho Mutual. *Scarfone v. Marin*, 442 So.2d 282 (Fla. App. 1983) holds that:

> [T]he proper test of relation back of amendments is ... whether the pleading as amended is based upon the same specific conduct ... upon which the plaintiff tried to enforce his original claim. *If* the amendment shows the same general factual situation as that alleged in the original pleading, *then* the amendment relates back.

Id. at 283 (emphasis added). The Florida court went on to hold that because the "second amended complaint alleged substantially the same *conduct*," "the second amended complaint relate[s] back." *Id.* (emphasis added). In this case, we have entirely new conduct and an entirely new "factual situation" than that alleged in the Original Complaint. The new work which

allegedly supports the Second Lien had not been performed at the time the original pleading was filed, so the original pleading could not have "set forth" or "attempted to set forth" the new work, as required by Idaho Rule of Civil Procedure 5(c) for relation back.

Finally, Terra-West argues in a footnote that *the Amended Complaint is a "supplemental pleading" under Idaho Rule of Civil Procedure 15(d).* Idaho Rule of Civil Procedure 15(d) requires that a party seeking leave to file a supplemental pleading first seek leave of the court to file such a pleading, and if the court grants leave, the court will then notify the adverse party if and when to file a response. Terra-West has never sought leave of any court to file a supplemental pleading in this case, and this is the first time the Amended Complaint has ever been referred to as a "supplemental pleading." Terra-West's motion in the District Court was for leave to file an "amended complaint;" the pleading itself is styled the "First Amended Complaint." Even if the Court construes the Amended Complaint as a "supplemental pleading," this new argument sheds no light on this case: whether the Amended Complaint is deemed an amended pleading or a supplemental pleading (1) does not change the analysis regarding whether proceedings were "commenced" under Idaho Code Section 45-510, and (2) does not change the relation-back analysis, as the same rules apply. *See Duff v. Draper*, 96 Idaho 299, 306, 527 P.2d 1257, 1264 (1974) (stating that the relation-back principals of Rule 15(c) also apply to supplemental pleadings); 6A THE LATE CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1508 (2d ed. 2009) ("Rule 15(d), of course, is subject to the basic test for relation back prescribed by Rule 15(c). ... There is little basis to distinguish an amended and a supplemental pleading for purposes of relation back if defendant had notice of the subject matter of the dispute ...").

Whether because the motion for leave to amend does not "commence proceedings," or because statute of limitations principles do not apply to Idaho Code Section 45-510, or because the Amended Complaint does not relate back to the Original Complaint because no notice of the new work and Second Lien were given in the Original Complaint, no proceedings were commenced to enforce the Second Lien within six months of its filing and the Second Lien has expired under Idaho law. The District Court's grant of leave to amend to Terra-West should be reversed.

E. Terra-West Should Not Be Granted A Non-Statutory Right To Validate An Invalid Lien.

Mechanic's liens are statutory rights which cannot be expanded by the courts. "Mechanic's and other related liens are creatures of statute, and statutory requirements must be substantially complied with in order to perfect a valid lien." *Baker v. Boren*, 129 Idaho 885, 895, 934 P.2d 951, 961 (Ct. App. 1997). And while the "lien statutes are to be liberally construed with a view to effect their objects and promote justice" (*Id.* (internal citations omitted)), this Court has held that "[b]ecause such a right exists solely as a result of statutory enactment, it depends entirely upon application of the statute involved." *Great Plains Equipment, Inc. v. Northwest Pipeline Corp.*, 132 Idaho 754, 760, 979 P.2d 627, 633 (1999). "The rule of liberal construction of statutory liens ... does not permit the court to create a lien where none exists or was intended by the legislature." *Id.* By performing additional work on the property, incorporating that work into its Second Lien, and then asking the court to foreclose the Second Lien, Terra-West is requesting the Court create a non-statutory right to revive an invalid lien.

A fundamental principle of Idaho's mechanic's lien law is that a lien claimant cannot unilaterally create a lien right. The right to a mechanic's lien is based not only on statute, but also on the lien claimant's contract with the property owner. Idaho Code Section 45-501 and Idaho Code Section 45-504; *Idaho Lumber, Inc. v. Buck*, 109 Idaho 737, 743, 710 P.2d 647, 653 (Ct. App. 1985) (holding that "mere consent or acquiescence of the owner that the work be done is not sufficient to give rise to a lien"); 53 AM. JUR. 2D *Mechanics' Liens* § 123 (2006) ("a mechanic's lien is dependent on a contract between the owner and the contractor. In the absence of a valid contract, the lien is unenforceable"). Where a lien claimant has "performed all of its obligations under the terms of the contract" (R. p. 11) with a property owner, it has no right to resurrect an invalid lien by doing additional work not contracted for.

Terra-West's proposed non-statutory right to resurrect a lien would set a dangerous precedent: the same statutes which provide lien claimants a right to lien also place very strict time limits on its enforcement, which include: (1) that "[t]he claim shall be filed within ninety (90) days after the completion of the labor or services, or furnishing of materials" (Idaho Code Section 45-507); (2) that "A true and correct copy of the claim of lien shall be served on the owner or reputed owner of the property ... no later than five (5) business days following the filing of said claim of lien" (Idaho Code Section 45-507); and (3) "No lien provided for in this chapter binds any ... improvement ... for a longer period than six (6) months after the claim has been filed" (Idaho Code Section 45-510). These time restrictions are strictly enforced by Idaho courts. *See, e.g., Palmer*, 388 P.2d at 99; *Ashley Glass Co., Inc. v. Bithell*, 123 Idaho 544, 547, 850 P.2d 193, 196 (1993) (strictly enforcing the requirement re timely service of the lien on the owner of the property as "a statutory condition for an effective lien"). Should Terra-West be

granted a non-statutory right to resurrect its facially invalid lien, such liens would be extended far beyond the life allowed by Idaho's mechanic's lien statutes. This case is illustrative: the work of the invalid First lien was allegedly completed November 30, 2007; the Amended Complaint was not filed until April 23, 2009, nearly ten months after the 90 days + six-month time in which Idaho's mechanic's lien law allows a lien to be filed an enforced. Idaho Code Section 45-507 and Idaho Code Section 45-510. Terra-West's argument potentially makes the statutory requirements for a valid lien null: if a lien is declared invalid due to the claimants failure to abide by any of the time limits or form requirements of Idaho's mechanic's lien law (Idaho Code Sections 45-507 and 45-510), the lien claimant merely has to perform "additional work" on the property and file a new lien incorporating the work alleged in the invalid lien. This result was not intended by the state legislature.

F. Terra-West Is Not Entitled To Attorneys' Fees On Appeal

Terra-West is not entitled to attorneys' fees on appeal because it has not cited to a single Idaho law which supports its argument that filing a motion for leave to amend will preserve a mechanic's lien from expiring under Idaho Code Section 45-510. Idaho Mutual's appeal, on the other hand, is based on Idaho statute and this Court's application of Idaho statute, as set forth above. Idaho Mutual's prosecution of this appeal has not been brought "frivolously, unreasonably, or without foundation." *Durrant v. Christensen*, 117 Idaho 70, 74, 785 P.2d 634, 638 (1990).

III.
CONCLUSION

For the reasons set forth above, and in Idaho Mutual's Appellant's Brief, Idaho Mutual respectfully requests that this Court reverse the District Court's order granting Terra-West's motion for leave to amend its Original Complaint.

RESPECTFULLY SUBMITTED THIS 29th day of December, 2009.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By _____
Ryan T. McFarland, ISB No. 7347
Attorneys for Appellant Idaho Mutual Trust, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of December, 2009, I caused to be served a true copy of the foregoing APPELLANT'S REPLY BRIEF by the method indicated below, and addressed to each of the following:

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X Hand Delivered
___ Overnight Mail
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